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No. 91-841

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

THE STATE OF COLORADO,

Petitioner,

v.

ROBIN AULD,

Respondent.

On Petition For Writ Of Certiorari
To The Colorado Court Of Appeals
Court Of Appeals No. 89CA0995

RESPONDENT'S BRIEF IN OPPOSITION

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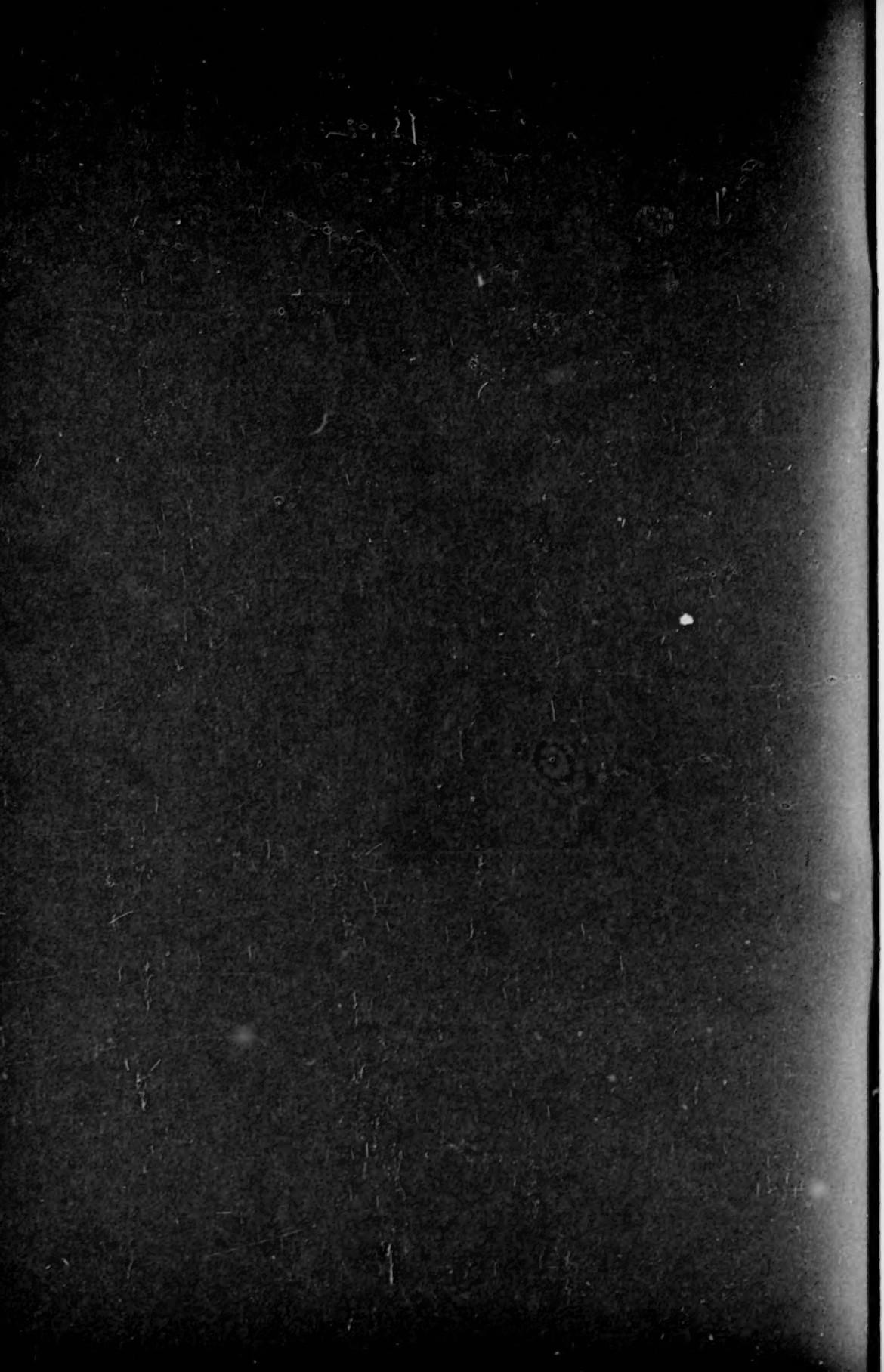


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INTRODUCTION

Respondent Robin Auld opposes the State of Colorado's Petition for Writ of Certiorari to review the judgment and opinion of the Colorado Court of Appeals in *People v. Auld*, 815 P.2d 956 (Colo. App. 1991), *cert. denied*.

Seeking to fashion a federal case out of the state court's application of state constitutional principles, Petitioner has misstated the holding of the Colorado Court of Appeals in the Opinion Below (Petition pp. 1-2), misrepresented the grounds upon which Petitioner requested review in the Colorado Supreme Court (Petition p. 2), and manufactured, for this Court's consideration, legal questions that are not ever raised by the Colorado court's decision.

The Colorado Court of Appeals' opinion is based upon a well-developed factual record. (Petitioner's App. pp. 2-3) Mr. Auld is an attorney whose practice in Durango, La Plata County, Colorado emphasized the defense of individuals accused of crimes. Based on a stale and unsubstantiated rumor that Mr. Auld at one time accepted drugs in lieu of fees, the steering committee for a La Plata County anti-drug program ("the Committee") made Mr. Auld the target of an undercover investigation. The members of the Committee – the local District Attorney, the County Sheriff, and other local police and sheriff's officials – often discussed their desire to compromise Mr. Auld and then pressure him into providing incriminating information about his clients and other members of the community. To that end, the Committee devised an elaborate scheme. A fictitious complaint, drafted by the District Attorney, typed by his secretary, signed by a

County Sheriff's officer and notarized by the District Attorney's wife, was filed in the local county court. The "complaint" purported to "charge" an undercover sheriff's officer with possession of drugs and weapons. The undercover officer was brought before the county court judge to answer to the fake "charges". The county court judge was completely unaware of the pivotal role she was to play in this charade. The undercover officer made false statements to the county court judge and lied under oath to obtain his release on a surety bond. The undercover officer then came to Mr. Auld for legal assistance in his "pending criminal case."

The officer did retain Mr. Auld, paying a small retainer fee in cash derived directly from the drug enforcement funds. When the officer suggested paying the balance of Mr. Auld's fee by giving "something in trade," Mr. Auld flatly refused to accept cocaine as payment. The undercover officer persisted in the Committee's campaign to compromise Mr. Auld in any way possible. He pressured Mr. Auld to accept a weapon as a fee. Mr. Auld refused. The officer pressed him again. Mr. Auld steadfastly demanded proper cash payment. Finally, reluctantly, and after unrelenting pressure from the officer, Mr. Auld agreed to hold a gun at a "black market price," but only as collateral for the money owed. Then the undercover officer stated that he was leaving town for good and absolutely could not pay \$500 in outstanding legal fees. Mr. Auld unwillingly agreed to take the weapon in payment for the debt. As soon as Mr. Auld took possession of the weapon he was arrested.

Immediately following the arrest, the District Attorney and his agents told Mr. Auld that possible charges

would "go away" if Auld violated his attorney-client privilege by providing information on present and former clients. (Petitioner's App. p. 3) Mr. Auld refused. See *People v. Auld*, 788 P.2d 1275 (Colo. 1990). As a result, charges were filed. The District Attorney obtained appointment of a special prosecutor, an assistant district attorney from another judicial district (now appearing as counsel for Petitioner), to handle the case, and charges were filed.

On Mr. Auld's motion, and after extensive evidentiary hearings, the state district court dismissed the charges, holding that the state prosecutor's outrageous misconduct in making the case violated the *state's doctrine of separation of powers*. (See Respondent's Appendix.)

Petitioner appealed the dismissal to the Colorado Court of Appeals. In a fact-driven decision based wholly on Colorado constitutional principles, the Colorado Court of Appeals found that the state prosecutors had committed outrageous misconduct violating the doctrine of separation of powers, that the imposition of the sanction of dismissal was an appropriate exercise of the court's supervisory power, and that dismissal under these specific circumstances did not violate the doctrine of separation of powers. (Petitioner's App. pp. 3-8)

Contrary to Petitioner's characterization of the state court proceedings, the district court did *not* hold that the government's misconduct violated the Due Process Clauses of the Fifth or Fourteenth Amendments of the United States Constitution, and the order of dismissal was *not* based on a due process violation. Nor did the Colorado Court of Appeals hold that the government's

misconduct violated the Due Process Clause of the United States Constitution. The Colorado Court of Appeals declined to apply a due process analysis to this case but focused instead on the state court's authority to exercise its supervisory powers in response to the state prosecutor's violation of separation of powers. (Petitioner's App. p. 6)

REASONS WHY THE WRIT SHOULD BE DENIED

- 1. The Questions presented in the Petition were not preserved or decided in the proceedings below.**

To make it appear that a federal constitutional question is present, Petitioner's Questions Presented for Review frames the issue as follows: Once a criminal defendant establishes that charges against him were the product of pervasive government misconduct, when does the United States Constitution require dismissal of the criminal charges and when does the separation of powers doctrine prohibit dismissal? The remainder of the Petition suggests in various ways that the courts below dismissed charges pending against Mr. Auld to vindicate some ill-defined notions of due process of law rather than some firmly-rooted constitutional principle. In fact, the questions raised in the Petition are neither reflected nor preserved in the proceedings below.

In the district court, Mr. Auld argued two separate motions seeking pre-trial dismissal of the charges lodged against him. Mr. Auld's *first* motion, which was rejected by the court, asserted that outrageous misconduct by the District Attorney and his confederates violated Mr.

Auld's right to due process of law. This due process motion was denied. (Respondent's Appendix p. 3) However, the court agreed with Mr. Auld's *second* motion, which argued that government misconduct violated the state law doctrine of separation of powers and warranted dismissal as a matter of the court's supervisory power over public prosecutors. (Respondent's Appendix p. 14)

Citing the state judiciary's power to protect itself against public prosecutors who would make the courts accomplices to prosecutorial misconduct, the district court observed:

How far can the Executive Branch involve the Judicial Branch, whether knowingly or unknowingly, as an accomplice to its undercover operations. . . . If there is any separation of powers and any independence of the branches of government, then it cannot be that a law enforcement officer or a district attorney decides when and to what extent the judiciary becomes involved, knowingly or unknowingly, in its undercover operations. This is particularly so when the courts are supposed to be the one arena of impartiality favoring neither the prosecution nor the defense . . .

The courts should not, and this Court certainly does not, sanction the filing of false and fictitious documents with the Court nor the securing of false and fraudulent misrepresentations to the Court regardless of the motive. In my mind, this is a clear line of distinction which separates this case from . . . those cases [decided under due process principles] and constitutes an impermissible taint upon the integrity and impartiality of

the courts. Therefore, defendant's motion to dismiss for governmental misconduct is granted.

(Respondent's Appendix pp. 11-14)

Petitioner appealed this order of dismissal to the Colorado Court of Appeals. Mr. Auld did not cross-appeal the denial of his due process motion, and that matter therefore was not before the Court of Appeals.

In its briefs to the Colorado Court of Appeals, Petitioner admitted what the district court had found – that state agents had committed acts which might be chargeable as criminal offenses in their pursuit of Mr. Auld. Petitioner nonetheless contended that because Mr. Auld's due process rights were not violated by that misconduct, dismissal under the circumstances violated separation of powers principles. The Court of Appeals rejected Petitioner's argument, finding that the local prosecutor's conduct violated the doctrine of separation of powers, that the courts possess supervisory power to fashion a remedy for such abuses of prosecutorial authority and that dismissal was an appropriate remedy in this case. The Court of Appeals declined Petitioner's invitation to apply a due process analysis to the facts presented. (Petitioner's App. p. 6) The Court of Appeals also rejected Petitioner's contention that the electoral process afforded the sole remedy for this prosecutorial abuse.

Petitioner filed a petition for certiorari in the Colorado Supreme Court, raising only the following related issues of state law: (1) if the defendant is not prejudiced by prosecutorial misconduct, does dismissal violate the doctrine of separation of powers by infringing on the district attorney's authority to enforce Colorado law; (2)

was the government's conduct outrageous under Colorado law; and (3) can prosecutors file fictitious cases in enforcing Colorado law. Through the first question, Petitioner sought to vindicate the district attorney's "authority to enforce Colorado law." This authority arises exclusively under Article III of Colorado's constitution. The second question was an unabashed plea for review of these facts under Colorado's due process standards, even though the case had not been decided below on due process grounds. The third question was a request that the Colorado Supreme Court provide some guidance to state prosecutors conducting "sting" operations.

Although the Colorado Supreme Court declined to answer these questions on certiorari, the issues were laid to rest when the Supreme Court disciplined the District Attorney whose misconduct was at the center of this case. In *People v. Reichman*, 819 P.2d 1035 (Colo. 1991), the Colorado Supreme Court held that the District Attorney's "responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility," and that the District Attorney violated Colorado's Code of Professional Responsibility through the deception he practiced on the district court in his pursuit of Mr. Auld.

Thus, the issues suggested, the theme explored, even the policy concerns pressed throughout Petitioner's petition are betrayed by the procedural and factual history of this case. The decision below was not "based on an erroneous application of the Due Process language of [*United States v.] Russell*." (Petition p. 8) Any prosecutor who actually *reads* the decision rendered by the Colorado

Court of Appeals in this case could not honestly "conclude that an undercover operation involving the filing of a fictitious court case is likely to violate the Due Process Clause." (Petition p. 10) Colorado prosecutors do not have the "right" to use state court judges or the court system as players and props in their investigative schemes. Creation by the district attorney of a fictitious case is unethical conduct under Colorado law. The *Auld* decision reconfirms that state courts are empowered by Colorado's constitution to respond to this kind of prosecutorial overreaching, nothing more.

2. **The decision below is based on principles of separation of powers and the state court's supervisory authority, both of which are doctrines of state constitutional law.**

Petitioner's entreaty to this Court rests entirely on the premise that the courts in Colorado have overstepped federal constitutional principles in their haste to fashion a remedy for prosecutorial misconduct. Petitioner's argument flows from a fundamental misunderstanding of constitutional jurisprudence.

The Colorado court's dismissal of state charges as a remedy for a local prosecutor's misconduct in a state court proceeding is *not* prohibited by separation of powers principles embodied in the United States Constitution. While the doctrine of separation of powers may be extremely important and fundamental to both federal and state governments, there is no federal constitutional separation of powers guaranty. One could be fashioned from the "republican form of government" clause of Article IV,

Section 4, but that clause is unjustifyable. *Luther v. Borden*, 7 How. 1, 48 U.S. 1, 12 L.Ed. 581 (1849). See Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. Rev. 1135 (1970).

In state proceedings, separation of powers is a principle of state constitutional law. "Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, with respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for determination of the State." *Dreyer v. Illinois*, 187 U.S. 71, 84, 23 S.Ct. 28, 32, 47 L.Ed. 79, 84 (1902). See *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed. 2d 1311 (1957); *International Brotherhood v. Hanke*, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995 (1950); *Highlands Farm Dairy v. Agnew*, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835 (1937). Any alleged violation by a branch of state government of that state's constitutional separation of powers is a matter of state concern and does not violate the federal constitution. *May v. Supreme Court of State of Colorado*, 374 F.Supp. 1210 (D. Colo.), aff'd, 508 F.2d 136 (10th Cir. 1974), cert. denied, 422 U.S. 1008 (1975). Accord, *In Re Interrogatories Propounded by the Senate*, 189 Colo. 1, 536 P.2d 308 (1975).

In Colorado, separation of powers among the three branches of government is mandated by Article III of the Colorado Constitution, *People v. District Court*, 632 P.2d 1022 (Colo. 1981), and each department of government derives its power solely from the state's constitution. *State Board of Medical Examiners v. District Court*, 138 Colo. 227, 331 P.2d 502 (1958). Thus, Petitioner's complaint that

the district court violated the doctrine of separation of powers by dismissing the charges against Mr. Auld in response to prosecutorial misconduct, raises issues only of state law.

Irrelevantly, Petitioner cites cases holding that government misconduct not rising to the level of due process violation will not warrant the dismissal of charges under federal law. (Petition pp. 6-7, n.2-4) In each case, the reviewing court concluded that misconduct, if proved, did not meet the high threshold for due process violations set by this Court in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973).

Not one of these cases considered a state court's right, guaranteed by that state's constitution, to protect its own integrity once it has been compromised by prosecutorial overreaching. Not once is the issue addressed in Petitioner's argument to this Court, yet that is the *only* reason that Colorado's courts dismissed the charges against Mr. Auld.

3. There being no federal question presented in the decision below, Petitioner cannot meet the jurisdictional requirements of 28 U.S.C. § 1257 or Supreme Court Rule 10.1.

This Court lacks jurisdiction to consider Petitioner's claims. In an effort to bring its claims before this Court under 28 U.S.C. § 1257 and Supreme Court Rule 10.1(b) and (c), Petitioner has misstated the holding of the Colorado Court of Appeals and misrepresented the constitutional basis for that holding.

This case was decided under principles of separation of powers and supervisory powers, both uniquely *state* constitutional doctrines when invoked in *state* proceedings. See Colorado Constitution Article III and Article IV, Section 2. The district court determined that the executive branch had engaged in conduct which compromised the judicial branch and violated the doctrine of separation of powers, and that this conduct was so outrageous as to demand a judicial response which protected the integrity of the court system. Exercising its supervisory power over the executive branch, the district court ordered the dismissal of the charges which were the result of that misconduct. The Court of Appeals agreed with the findings of fact, conclusions of law, and order of dismissal. Although justifiably outraged by the government's actions, the Colorado Court of Appeals expressly noted that Mr. Auld's due process claim was not the basis for the trial court's order of dismissal and was not, therefore, in issue on appeal. (Petitioner's App. p. 4)

Because this case was decided under independent state constitutional principles unrelated to the Due Process Clause or any other provision of the United States Constitution, no federal question is presented by this case. Moreover, there can be no conflict among state courts of last resort with regard to the issue determined by the Colorado Court of Appeals, since the case interprets and applies only Colorado's constitution. Petitioner can offer no legitimate reason why this Court should accept jurisdiction in this case.

CONCLUSION

Petitioner misapprehends the basis for the Court of Appeals' decision in *People v. Auld*. That decision, on its face and in the context of the issues resolved by the district court's order of dismissal, must be read for what it is: a fact-bound application of state constitutional doctrine. The state appellate court, like the state district court before it, reviewed the evidence of the state prosecutor's conduct, measured it against the Colorado Constitution's separation of powers guarantees, and found the state prosecutor's conduct wanting.

As to matters such as these arising solely under Colorado's laws, this Court can provide no relief. This Court should deny the State of Colorado's Petition for Certiorari.

Dated: January 27, 1992.

Respectfully submitted,

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RESPONDENT'S APPENDIX
DISTRICT COURT, LA PLATA COUNTY, COLORADO
CASE NO. 88 CR 129

ORDER

**PEOPLE OF THE STATE OF
COLORADO,**

Plaintiff,

vs.

ROBIN K. AULD,

Defendant.

This matter coming on for motions hearings on April 24 and 25, 1989, in the District Court for La Plata County, Colorado, the defendant present in person and by his attorney, Mr. Harold A. Haddon, and the People appearing by its attorney, Mr. Keith Cross, the Court taking testimony, hearing evidence, reviewing the Court file, and being otherwise advised in the premises, hereby enters the following order:

* * *

**IV. DEFENDANT'S MOTION TO DISMISS BASED ON
GOVERNMENTAL MISCONDUCT**

The defense in this case filed two motions to dismiss, one based on governmental misconduct and the other based on outrageous government misconduct as a due process violation. The defense alleges four grounds for

dismissal and the Court will consider three of them together, namely, that the officers did not have probable cause or suspicion to target the defendant for an undercover operation and even if they did, that when the defendant refused to accept drugs for fees, the undercover action should have been discontinued. The Court rejects this argument. First of all, it is contrary to the evidence adduced at the preliminary hearing, the motions hearings and the tape recordings of the conversations between the undercover officer and the defendant. The evidence is clear that the undercover officer offered the defendant, in his capacity as an attorney, drugs in exchange for fees and legal services, however, the defendant rejected the drugs and instead himself offered to accept guns at black market prices. There is no case law nor statutory law to suggest or support the defendant's contention in this regard. Secondly, the defense claims that the government's conduct was outrageous in that it constituted an impermissible infringement on the attorney/client relationship by creating a false client for the attorney, by trying to turn the attorney into an informant against his clients, and involves tape recordings of the attorney/client discussions without the consent of the attorney. The Court also rejects this claim for the reasons stated above in the discussion dealing with the suppression of the tape recordings.

Likewise, and thirdly, the defendant claims that the law enforcement officer deliberately failed to record certain conversations and thereby engaged in selective recording resulting in the destruction of potentially exculpatory evidence. Again, this has been discussed above, and the Court has found that there is no evidence

in the record to support this claim and the idea that any conversations which were not recorded contained exculpatory evidence is mere conjecture on the part of the defendant.

The Supreme Court of Colorado in the case of *People in Interest of M.N.*, 761 P.2d 1124 (Colo. 1988), discussed at great length the issue of governmental misconduct which would be so outrageous as to warrant a dismissal of the charges against the defendant as violative of due process. In reviewing the Supreme Court's discussion in those cases, it is clear that the three reasons asserted by the defendant discussed above do not rise to such a level, and at the most, would only constitute factual matters possibly relevant to the defendant's claim of entrapment.

A fourth and more troubling reason asserted by the defendant is the claim that law enforcement officials through the District Attorney's office caused false and purged documents to be filed in the La Plata County Court and that the undercover officer, Brent Pace, in his role as the fictitious client named Colt Young, provided false statements to the Court.

In its motion and brief, the defense states that, based on *People in the Interest of M.N.*, *supra*, the Court should rule on the due process argument only after the trial and only after the entrapment defense is rejected by the jury. This Court can certainly be wrong, however, I do not read the *M.N.* case to so state. The Court at Page 1131 of its opinion distinguished between the outrageous governmental conduct defense and the affirmative defense of

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entrapment, and stated that the due process issue is interwoven with the entrapment defense. It is clear the entrapment defense involves questions of fact which are resolved by the trier of fact, however, I see nothing in the M.N. [sic] which indicates that the Supreme Court disapproves of the trial judge determining this motion prior to trial. The Supreme Court reversed the District Court in that case, but made no reference that I can see disapproving of the trial court's procedure. Therefore, for better or worse, the Court will enter an order relating to the defendant's motion to dismiss based on governmental misconduct and the due process argument related to governmental misconduct.

The activities in the M.N. case involved an undercover drug enforcement officer enrolled at a Montezuma-Cortez high school. The undercover officer became involved with a student named M.N. and gave the juvenile money to purchase marijuana. The undercover officer also asked M.N. to steal tires and rims and car stereos. The juvenile and the undercover officer were arrested so that the juveniles were not aware that the undercover officer was in fact a law enforcement officer. A few days after the arrest, the undercover officer persuaded the juveniles to purchase additional marijuana. Thereafter, delinquency petitions were filed concerning the juveniles. At a hearing on the motion to dismiss, the trial court found that the undercover officer violated C.R.S. 1973, 19-3-119 by inducing, aiding or encouraging a child to violate the law. The District Court dismissed the petitions and the Supreme Court reversed the dismissals.

The fact scenario in the instant case as a result of the preliminary hearing, the motions hearings and the evidence adduced at said hearings, reveal that law enforcement officers in La Plata County were trying to interdict the drug traffic and placed an undercover officer, Brent Pace, who went by the fictitious name of Colt Young, in Durango, Colorado. The undercover officer frequented certain establishments known to the police for their activities and in the course of several months became aware of information which caused them to believe that defendant Auld was possibly involved with drugs. In cooperation with the La Plata County Sheriff's Department, the Durango Police Department and the District Attorney's Office, the undercover officer as Colt Young was arrested in a public establishment, taken to the jail and booked on charges of unlawfully carrying a concealed weapon and possession of marijuana as misdemeanor offenses. The defendant posted a surety bond on September 6, 1988, which bond was sworn to under oath in front of a Deputy Clerk for the County Court, and subsequently filed in the County Court for La Plata County. The District Attorney's office prepared a fictitious offense report and the District Attorney himself prepared a misdemeanor complaint charging the defendant with carrying a concealed weapon and possession of marijuana as a misdemeanor and caused the complaint to be filed in the La Plata County Court.

When the defendant was arrested, he was brought before the La Plata County Judge, Judge Patricia A. Hall, and advised of his rights, the charges and the penalties for which he was arrested and was questioned by the Court about general information relating to his status and

his bond. During the course of that Court appearance, a transcript of which was introduced into evidence at the hearings marked defendant's Exhibit B, the undercover officer as the fictitious Colt Young made numerous false statements to the Judge. The next Court appearance was on September 23, 1988, for the filing of charges, during which the defendant Auld represented the fictitious Mr. Young and entered a plea of not guilty and requested a trial. Later, on October 11, 1988, the case was dismissed by the District Attorney's office.

I have set out the two basic fact scenarios of the *M.N.* case and the instant case because the fact scenario in the *M.N.* case and the cases discussed in the *M.N.* case all involve conduct of law enforcement officers within their own arena, that is the Executive Branch. The Supreme Court in the *M.N.* case discussed numerous cases, most of them Federal cases, which recognize that in a proper case, the conduct of the government may be so outrageous as to shock the conscience resulting in a dismissal. I cannot find in any of those cases nor in the *M.N.* case itself discussion relating to a situation in which the undercover activities of law enforcement have crossed over from the Executive Branch to the Judicial Branch. A general proposition which seems to stem from the *M.N.* case is that as long as the undercover activity, even though it may involve illegal activities on the part of the law enforcement officers themselves, stays within the Executive Branch, the courts will not interfere unless the conduct is outrageous within the Executive Branch itself. The courts have essentially recognized that law enforcement is entitled to some degree to fight fire with fire and as stated on Page 1131 of the *M.N.* case:

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"It is the duty and role of the District Attorney, not the Judge, to decide whether justice requires that a particular individual should be charged with violating a criminal statute. A Judge does not have the power to charge an individual with violation of a criminal statute . . . "

Therefore, unlawful activities performed by undercover officers in the performance of their duties does not necessarily subject the officers to prosecution, particularly where the undercover activity is confined to their own arena, the Executive Branch.

The problem in this case is the involvement of the Court system and judiciary as an involuntary extension of the undercover activities of the law enforcement officers. Defendant's Exhibit G is a surety bond filed with the Court for La Plata County in Case No. 88 M 291 signed by the fictitious Colton Young and under oath on September 6, 1988, in front of a Deputy Court Clerk. Defendant's Exhibit H is the complaint against the fictitious Colton Young charging him with unlawfully carrying a concealed weapon and the mesdemeanor [sic] marijuana charge sworn under oath on September 19, 1988, by Tony James, a law enforcement officer and notarized by the wife of the District Attorney, Mary Katherine Reichman. This document was filed in the La Plata County Court Case Number 88 M 291. Defendant's Exhibit B is the transcript of proceedings which took place in the La Plata County Court for the fictitious Colton Young on September 13, 1988, and on September 23, 1988. This Court is not aware of any case or statute which sanctions the filing of false and perjured documents in an official court proceeding as part of an undercover operation.

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C.R.S. 1973, 18-8-503, Perjury in the Second Degree, 18-8-502, Perjury in the First Degree, and 18-8-504, False Swearing are all offenses under the Colorado Criminal Code, and the definitions of "materially false statement" and "Oath" are defined in 18-8-501. All of these offenses to some degree may have occurred in the La Plata County Court Case No. 88 M 291 against the fictitious Colton Young. The District Attorney, Mr. Vic Reichman, testified on cross-examination that he prepared the complaint which was filed in 88 M 291, but thought it was alright because the complaint was part of their undercover operation and was designed to give their informant credibility since the defendant in the instant case was an attorney himself. On cross-examination, Mr. Reichman stated that that was his motive, however, the intent was to file a false document with respect to the fictitious Colton Young and that there was no intent, in reality, to actually charge the fictitious Colton Young with "real" criminal charges.

Sergeant Ball, who was in charge of the undercover operation, testified at the hearings that he did not intend for the undercover operation to get as far as it did, and was not aware that false and fictitious documents would be filed with the court, and was not aware that the undercover officer as the fictitious Mr. Young would make false statements to the Judge in open court. The undercover agent himself testified that he did not think the operation would go so far, but felt that he had to make those false statements when he found himself in court so as not to blow his cover. Additionally, defendant's Exhibit J, a letter dated November 2, 1988, from the District Attorney to the Sheriff's office, Mr. Reichman, in attempting to persuade law enforcement officers to

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refrain from any further procurement activity with respect to the defendant Auld, states that:

" . . . if you or any other officer under your direction persists in pressuring Mr. Auld directly or indirectly to assist law enforcement, I will immediately request the appointment of a special prosecutor and divorce myself fully from any other LEADS activities. I regret having to take such a firm stand, but this seeming approach of 'the ends justify the means' is of great concern to me . . .".

It seems to this Court, based upon the testimony of the law enforcement officer in charge of the undercover operation, the undercover officer, and the District Attorney, that they themselves feel their activities in involuntarily involving the Court in their undercover operations is highly questionable. The case of *United States v. Omni Inter. Corp.*, 634 F. Supp. 1414 (D) Md. 1986 [sic], discusses at great length the idea of governmental misconduct, and the dismissal of charges based on governmental misconduct. That case involved an IRS case against the defendant concerning tax fraud and tax evasion. After a long discussion, the court in that case dismissed the charges against the defendant because of outrageous governmental misconduct. The court there rejected the defense argument that breaches of the attorney/client privileges amounted to governmental misconduct, however, the court did dismiss based on three general categories of concern found at Page 1423, specifically altered and created documents, incorrect testimony before the court along with criminal allegations of perjury and obstruction of justice, and what the court called a disheartening lack of candor with and testimony before the court. Although

the testimony in that particular case occurred over a several month period of time, the court at Page 1428 stated:

"The second major area of concern to the Court involves the repeated untrue and incorrect testimony which occurred during the course of the proceedings. The impact of such testimony to this Court, setting [sic] as fact finder for the evidentiary hearing, cannot be underestimated. Based on the erroneous testimony given, as uncovered during the hearing, the Court simply cannot put its complete trust and confidence in certain government witnesses."

At Page 1432, the court stated:

"The *motive* involved in this case is irrelevant to the Court's disposition of the matter. The critical fact is that there was a considerable amount of false, wrong testimony . . .".

The third area of the court's concern may be described as lack of candor. It is clear beyond [sic] any doubt that misrepresentations were made to the court, from the beginning of the evidentiary hearing. Misrepresentations occurred in colloquies with the court and in testimony by witnesses. The court then goes on beginning at Page 1436 to wrestle with the question of what sanctions should be imposed. The court begins by saying at Page 1436:

"The issue of dismissal of the indictment is not an easy one. The use of the supervisory power supports three institutional goals: Deterring illegal conduct by government officials, protecting and preserving the integrity of the judicial process, and implementing a remedy for violation of recognized rights."

The court then goes on to wrestle with the question of whether or not actual prejudice to the defendant must be shown in order to dismiss the charge, and concludes under the facts of that case that the misconduct was extreme, flagrant and that the misconduct was not isolated, but long standing. The court stated at Page 1438 of its opinion that:

"Decisions emphasize the unifying premise in all of the supervisory power cases that although the doctrine operates to vindicate a defendant's rights in an individual case, it is designed and invoked primarily to preserve the integrity of the judicial system . . .".

Utilization of the supervisory power remains a harsh ultimate sanction, but must be used for "conduct that shocks the conscience." The court has particularly stressed the need to use the supervisory power to prevent the federal courts "from becoming accomplices to such misconduct." The court finally rejects the prosecution argument that all of this was "harmless error" and dismissed the indictment.

The facts in the *Omni* case are certainly more aggressive than [sic] is present here, however, the question remains to be settled of where this line of demarcation is. How far can the Executive Branch involve the Judicial Branch, whether knowingly or unknowingly, as an accomplice to its undercover operations. The courts, including the Supreme Court of the State of Colorado have long recognized the need and the desirability of law enforcement to conduct undercover operations for the protection of society and certainly no one quarrels seriously with that proposition. However, as stated before,

most of the cases deal with activities within the Executive Branch itself, that is, the law enforcement operations themselves, and do not involve cases in which the Judicial Branch is involved. If there is any separation of powers and any independence of the branches of government, then it cannot be that a law enforcement officer or a district attorney decides when and to what extent the judiciary becomes involved, knowingly or unknowingly, in its undercover operations. This is particularly so when the courts are supposed to be the one arena of impartiality favoring neither the prosecution nor the defense.

The Illinois case of *In Re Friedman*, 392 N.E. 2d 1333 (1979) involved a disciplinary proceeding before the Supreme Court of Illinois on facts somewhat similar here. The respondent in that case is Colorado's equivalent of a district attorney who had participated in an undercover operation which involved false court documents and false testimony, although in one of those instances the court, after the hearing, was advised of the circumstances surrounding the case. The respondent in that case argued at Page 1334 of the opinion that:

"The courtroom is not immunized by the code of professional responsibility from investigation methods otherwise lawful and ethical and that perjury and the secreting of witnesses are necessary methods for the successful investigation and prosecution of corrupt attorneys, whose stealth makes less deceptive investigatory techniques ineffective."

The respondent further argued that his loftiest motive negates any technical violation of the Code of Professional Responsibility. The court goes through an analogy

of the ABA Standards for Professional Conduct such as DR7-109 and the court found at Page 1335 that the respondent's conduct deviated from the disciplinary rules. The court states at page 1335:

"He (the respondent) argues that to impose discipline for his conduct would give more emphasis to the abstract concept of the courtroom's sanctity than [sic] to the substances of an honest legal system. While respondent asserts that he is not arguing that the end justifies the means, we so construe his argument and find it unacceptable. The integrity of the courtroom is so vital to the health of our legal system that no violation of that integrity, no matter what its motivation, can be condoned or ignored."

The court goes on to quote Mr. Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928) as follows:

"Decency, security and liberty alike demand that governmental officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potentate, the omni-present teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine, this court should resolutely set its face."

The court further goes on to state that because the respondent acted without guidance of prescedent [sic] or settled opinion (which sounds exactly like this case) the Supreme Court of Illinois concluded that no sanctions should be imposed.

In agonizing over this decision, this Court concludes that the rationale in the *Omni* case and the *Friedman* case should control. It would be far easier for this Court to say that there was no actual resulting prejudice to the defendant and therefore deny the requested dismissal, however, the public has a right to demand and to expect that the courts will do their utmost to remain impartial and to promote the public's confidence in the integrity of the courts. The courts should not, and this Court certainly does not, sanction the filing of false and fictitious documents with the Court nor the securing of false and fraudulent misrepresentations to the Court regardless of the motive. In my mind, this is a clear line of distinction which separates this case from the *M.N.* case and those cases discussed in the *M.N.* case, and constitutes an impermissible taint upon the integrity and impartiality of the courts. Therefore, defendant's motion to dismiss for governmental misconduct is granted.

* * *

Resp. App. 15

For the reasons stated above, the Court hereby dismisses the Complaint against the defendant, and vacates the trial date of May 22, 1989.

DATED this 12 day of May, 1989.

BY THE COURT

/s/ Richard J. Brown
Richard J. Brown,
Acting District Court Judge

xc: Haddon
Cross

